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No. 95-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN F. CARTER, JOHN M. SWING, and
JOHN J. VERONIS, JR.,

Petitioners,

vs.

HELMSLEY-SPEAR, INC. and 474431 ASSOCIATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should overturn the holding of the Court of Appeals that the District Court's findings of fact were clearly erroneous?

2. Whether an artist's ownership of the copyright of a work of art precludes the effect of the work for hire exclusion found in the Visual Artists Rights Act of 1990 even though that Act expressly provides that rights thereunder are "distinct" from copyright?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents advise the Court that Helmsley-Spear, Inc. is a subsidiary of Helmsley Enterprises, Inc., and neither issues stock to the public. All subsidiaries of Helmsley-Spear, Inc. are wholly owned by Helmsley-Spear, Inc. 474431 Associates is a general partnership whose partners are Alvin Schwartz and Supervisory Management Corp., a wholly-owned subsidiary of Helmsley Enterprises, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Helmsley-Spear, Inc. and 474431 Associates ("Associates") respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 1, 1995, which reversed the decision of the United States District Court for the Southern District of New York on the ground that the District Court made clearly erroneous findings of fact when it held that the sculpture at issue (the "Sculpture") was not a work for hire.

COUNTERSTATEMENT OF THE CASE

Associates is the owner of the property at issue, a mixed-use warehouse in Queens, New York (the "Property"). In

February 1990, prior to the enactment of the Visual Artists Rights Act of 1990, 17 U.S.C. § 101 *et seq.* (1994) ("VARA"), Associates leased the Property by a net lease to 47-44 31st Street Associates L.P. ("Limited Partnership").

In December 1991, Petitioners (the "Artists") entered into a written agreement, which is self-described as a "Letter of Employment", with the agent of the Limited Partnership, SIG Management Company ("SIG"), (the "Letter of Employment"). There was never an agreement of any sort between Artists and Associates. An attorney for the Artists assisted the Artists in the negotiation of the Letter of Employment.

The Letter of Employment expressly provided that SIG would own the sculptures created by the Artists, that the Artists would own the copyrights to such sculptures, that SIG and the Artists would share any fees received from the use of such sculptures on a 50/50 basis, and that for a period of five years from the date of the Letter of Employment, SIG would not modify the sculptures without the approval of two of the three Artists, which approval was not to be unreasonably withheld.

From December 1991 through April 6, 1994, the Artists, together with other persons, created and installed the Sculpture in the Property. The work on the Sculpture was commenced without the knowledge or approval of Associates. The Sculpture violates applicable building and electrical codes, has caused a structural change to the Property, and has resulted in unsafe conditions at the Property.

There was no set date for the termination of the Artists' employment. During the years that the Artists worked at the Property, they each received pay of $1,000.00 per week. Federal, state, and local income taxes, and social security and medicare taxes were withheld from the Artists' weekly pay, and, at years' end, appropriate W-2 forms were given to the Artists. Pursuant to the Letter of Employment, SIG and Limited Partnership provided life insurance, health insurance, dental insurance and liability insurance to the Artists. Limited Partnership discontinued the health and dental insurance

benefits in December 1993 and, at that time, extended COBRA benefits to the Artists.

Pursuant to the Letter of Employment, the Artists, if they chose to take them, were provided paid vacations by SIG and Limited Partnership. The Artists were given or offered bonuses of food or gifts at Christmas and Thanksgiving by SIG and Limited Partnership.

The Artists agreed to work principally for SIG and Limited Partnership on a 40 hour per week basis and would only do other work to the extent that it would not "interfere with services to be provided pursuant to the terms of this letter of employment." SIG and Limited Partnership provided the Artists with many, if not most, of the supplies used to create the Sculpture. Although the Artists could use assistants who would be paid by SIG or Limited Partnership, the Artists could not hire any paid assistants without the express approval of either SIG or the Limited Partnership.

SIG and Limited Partnership could and did assign the Artists additional tasks at the Property other than the creation of the Sculpture. The additional tasks assigned to and performed by the Artists included the decorative painting of the boilers in the basement of the Property and the decoration of portions of the sixth and eighth floors for tenants.

In March 1994, Limited Partnership's net lease was terminated, and on April 6, 1994, Limited Partnership surrendered possession of the Property to Associates. The Artists were told by representatives of Associates that they could no longer work at the Property and would have to leave the Property. After April 8, 1994, two of the Artists filed for New York State unemployment insurance benefits with Mr. Swing listing Limited Partnership as his employer.

The District Court determined that the Sculpture was not a work for hire and, therefore, was not excluded from the definition of a work of visual art set forth in VARA.

The Court of Appeals analyzed the work for hire issue pursuant to *Community for Creative Non-Violence v. Reid*[1] and reversed on the ground that the District Court made clearly erroneous findings of fact with respect to the work for hire issue. (16a-22a).

The Artists have quoted part of the Court of Appeals's discussion concerning whether the Artists' ownership of the copyright in the Sculpture, pursuant to the Letter of Employment, constituted a "plus factor" that would change the holding on the work for hire issue. The Artists have quoted correctly the first sentence of the Court of Appeals's discussion, but have omitted the second and determinative sentence. Both sentences are set forth here:

> We are not certain whether [copyright ownership] is a "plus factor," and therefore put off for another day deciding whether copyright ownership is probative of independent contractor status. Even were it to be weighed as a "plus factor," it would not change the outcome in this case. (20a)

REASONS FOR DENYING THE WRIT

It is apparent that the Artists' petition does not satisfy any of the standard reasons for granting a petition for a writ. This first appellate decision interpreting VARA does not conflict with any relevant decision of the Court, does not conflict with any decision of another United States court of appeals, does not conflict with a decision of a state court of last resort, has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power, and has not decided an important question of federal law that has not been, but should be, settled by the Court.[2]

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[1] 490 U.S. 730 (1989).

[2] Sup. Ct. Rule 10.

The Court of Appeals simply determined that in view of the unique facts of this case, the Artists were employees of SIG and Limited Partnership, and, therefore, the Sculpture was a work for hire under VARA.

The Artists concede that the Court of Appeals should have and did rely on *Reid* for the principles to be applied in a work for hire analysis. The Artists also concede that the Court of Appeals correctly determined, with two possible exceptions, the nature and effect of the evidence concerning the work for hire issue. The Artists' primary contention, which they express in different ways, is that Court of Appeals erred in not finding that the Artists' ownership of the copyright in the Sculpture was the controlling factor on the work for hire issue. The Artists' argument fails on multiple levels.

Before turning to the errors in the Artists' argument, it is appropriate to review the applicable law. VARA grants certain rights to authors that create works of visual art.[3] A work of visual art does not include "any work made for hire".[4] VARA expressly provides at 17 U.S.C. § 106A(b),(e)(2) that VARA rights are "distinct" from copyright:

> Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner.
>
> ***
>
> Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work.

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[3] 17 U.S.C. §106A.

[4] 17 U.S.C. §101.

In interpreting VARA, the Court is to give effect to the clear meaning of the statute as written,[5] and not interpret VARA so as to make any provision inoperative.[6] Moreover, the Court should not rewrite VARA to make it conform to the Court's concept of appropriate policy[7] or to improve the effect of the statute.[8]

In their effort to avoid the effect of the Letter of Employment, the undisputed conduct of the Artists, SIG and Limited Partnership during their relationship, the clear language of VARA, and a reasoned application of *Reid*, the Artists seek to have VARA rewritten to provide that the work for hire exclusion does not apply when the author of a work owns the copyright and, further, that in such circumstances the test formulated in *Reid* need not be followed. The Artists are wrong.

I. THE *REID* FACTORS SUPPORT A FINDING OF EMPLOYEE STATUS

The Artists' argument first fails because the Court of Appeals was correct in its holding, which has been ignored by the Artists, that "[e]ven were [copyright ownership] to be weighed as a 'plus factor', it would not change the outcome in this case." (20a) The Artists do not contend that the Court of

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[5] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.").

[6] *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("[It is an] 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative'...." *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

[7] *Bankamerica Corp. v. U.S.*, 462 U.S. 122, 140 (1983) ("We are bound to respect that choice [of Congress]; we are not to rewrite the statute based on our notions of appropriate policy.").

[8] *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

Appeals incorrectly stated the standard established by *Reid* for determining whether a work is a work for hire. (16a, 17a). The Artists cannot seriously dispute, as the Court of Appeals held, that when the totality of the evidence is weighed, the single fact of ownership of the copyright would not create independent contractor status and would not change the outcome of the case.[9] Indeed, many of the indicia of employee status were stipulated facts reflecting a two year pattern of conduct by the Artists, SIG and Limited Partnership. The evidence, beginning with the Letter of Employment and its requirement that the Artists devote their "business time" "solely and exclusively" to SIG, continuing through the withholding of taxes, the provision of insurance and other benefits, the provision of supplies and tools, the restriction on the hiring of paid assistants, and the Artists' performance of tasks other than the creation of the Sculpture, and ending when the Artists filed for unemployment benefits, establishes that the Artists were employees and not independent contractors. (18a-22a).

More importantly, the assignment of the copyright to the Sculpture to the Artists in the Letter of Employment supports the finding that the Artists were employees. If the Artists had been independent contractors, it would not have been necessary to assign the copyright to them, they would have owned it.[10] Because, however, the Artists were hired as employees, they sought to obtain rights not otherwise available to them. The Artists, who retained counsel to advise and represent them with respect to the negotiation of the Letter of Employment, bargained for the assignment of the copyright. Thus, the assignment of the copyright in the Letter of Employment demonstrates that the Artists and their counsel understood that

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[9] *Reid*, 490 U.S. at 752 ("No one of these factors [used in evaluating employee status] is determinative.").

[10] See *Reid*, 490 U.S. at 750, 751 ("To determine whether a work is for hire under the Act, a court first should ascertain ... whether the work was prepared by an employee or an independent contractor.").

the Artists were hired as employees, not as independent contractors.

II. VARA RIGHTS ARE DISTINCT FROM COPYRIGHT

Confronted with the simple truth that the *Reid* analysis compels a finding that the Artists were employees even if the copyright ownership were a "plus factor", the Artists are forced to another argument: not only is copyright ownership a "plus factor", it is the only factor. As the Artists put it:

> There should be simply no need to engage in the *Reid* analysis where an unambiguous written agreement provides that the Artists will retain copyright ownership in their Work. (Pet. Brief 16).

The Artists' argument would require the rewriting of VARA and the abandonment of *Reid*. The argument should be rejected.

The Artists' argument that copyright ownership is the determinative factor is actually an argument that Congress silently created an exception to the work for hire exclusion when an artist owns the copyright to the work. There is nothing in VARA that supports the argument that a work for hire exclusion does not apply when an artist owns the copyright to art. To the contrary, VARA states at 17 U.S.C. § 106A(e)(2) that VARA rights are "distinct" from copyright.

Congress expressly provided that if an author did not own the copyright in the work he or she could nevertheless seek to enforce whatever VARA rights he or she might have. Congress easily could have provided that when the author of a work of art holds the copyright, the work cannot be a work for hire. The Artists argue that the Court should reject the determination of Congress that VARA rights are distinct from copyright and hold that the ownership of the copyright compels a finding of VARA rights. The Artists argue that by ignoring what Congress enacted the Court can find what Congress intended. These arguments are meritless.

The intent of Congress can best be found in the language of VARA.[11] Congress expressly separated VARA rights from copyright and expressly excluded works for hire from VARA protection. The Artists' argument that Congress did not intend for VARA rights to be bargained away by an artist who retains a copyright is wishful thinking designed to achieve a specific result in this idiosyncratic case.

There is no reason why an artist, like the Artists here, could not follow counsel's advice and agree with his or her prospective employer to retain a copyright, but not VARA rights. Similarly, the artist could agree to retain VARA rights, but not copyright, or to retain both rights or neither. Simply put, Congress allowed an artist to agree to any such arrangement and severed the copyright and VARA rights interests. Now, the Artists ask the Court to rewrite VARA to make the distinction between VARA rights and copyright inoperative. This argument, too, should be rejected.

III. THIS UNIQUE CASE DOES NOT WARRANT THE GRANT OF CERTIORARI

Even if the Court of Appeals had erred in its application of the *Reid* analysis, and even if the ownership of the copyright to the Sculpture were to create an exception to the work for hire exclusion of VARA, this case still does not warrant the grant of a writ. This first case applying VARA is a factual aberration. Associates, the owner of the Property, had no relationship to the Artists and, in fact, had leased the Property to Limited Partnership prior to enactment of VARA. Although Limited Partnership abandoned its interest in the Property to Associates, the Artists claimed that their VARA rights would bind Associates even after the termination of their employer's estate. The Artists, who were advised and represented by

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[11] *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) ("We 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'....", *quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 467 U.S. 189, 194 (1985)).

counsel prior to entering into the Letter of Employment, expressly agreed to permit modifications of the Sculpture. Further, although the Artists negotiated for the retention of copyright ownership, except for possessing that degree of skill and artistic freedom that one would expect artists to have, they otherwise had all the indicia of employee status. The Sculpture, which violates applicable building and electrical codes and constitutes a structural change to the Property, cannot be removed without some damage to some floor tiles that constitute a mosaic that forms part of the Sculpture. In sum, the unique factual context of the case would make a review by the Court a review of the correctness of factual findings and, thus, the case is unsuitable for the granting of a writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
April 15, 1996

Respectfully submitted,

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